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No. 86-121

In the Supreme Court of the United States

OCTOBER TERM, 1986

ASHTON HARRIS PULLY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below committed several violations of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

1. Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on four counts of bankruptcy fraud, in violation of 18 U.S.C. 352. He received concurrent five-year sentences on each count, with all but 179 days suspended in favor of five years' probation. He also was fined $8,000. The court of appeals affirmed (Pet. App. 28-44).

The evidence at trial established that petitioner failed to disclose his assets when he filed for personal bankruptcy (Pet. App. 30-31). He was indicted on January 9, 1984, and pleaded guilty on March 19, 1984 (*id.* at 29, 31-32). On June 5, 1984, however, petitioner sought to withdraw his guilty

plea and filed a motion to dismiss the indictment. The district court permitted withdrawal of the plea but denied the motion to dismiss. *Id.* at 32. Trial was scheduled for July 17, 1984.

On June 13, 1984, petitioner filed a notice of appeal from the court's order denying the motion to dismiss and moved the district court to stay further proceedings pending appeal. Two days later, the district court refused to stay the trial and declined to allow an interlocutory appeal of the denial of the motion to dismiss. That same day, June 15, 1984, petitioner offered another notice of appeal; on June 29, 1984, he again asked the court to stay proceedings. On July 6, 1984, the district court reiterated its view that the order denying the motion to dismiss was not appealable, although the court authorized petitioner to pursue his attempt to appeal pro se. Pet. App. 9-10, 32-33.

On July 9, 1984, petitioner filed a petition for a writ of mandamus in the court of appeals, arguing that a res judicata claim raised in his motion to dismiss involved a double jeopardy issue that could be pursued in an interlocutory appeal. On July 13, 1984, the court of appeals stayed petitioner's trial and directed the United States to respond to the mandamus petition. The court of appeals heard argument on the issue on February 7, 1985. On March 28, 1985, the court of appeals found petitioner's double jeopardy contention frivolous, denied the mandamus petition, and lifted the stay of the trial proceedings. Petitioner then moved to stay the mandate while he sought a writ of certiorari from this Court; the court of appeals denied the motion on April 17, 1985, and issued its mandate on April 19, 1985. Trial began on June 4, 1985. Pet. App. 33-36.

2. In an unpublished opinion, the court of appeals rejected petitioner's contention that his rights under the Speedy Trial Act had been violated. While the Act generally

provides that trial must begin within 70 days of indictment (see 18 U.S.C. 3161(c)((1)), the court explained that, under 18 U.S.C. 3161(i), the 70-day period began running in this case on the date that petitioner withdrew his guilty plea. Pet. App. 35. The court then held that June 13 and 14, when petitioner's first request for a stay was pending, were excludable from the 70-day calculation as delay resulting from the district court's consideration of a pretrial motion (see 18 U.S.C. 3161(h)(1)(F) and (J)) (Pet. App. 36). For the same reason, the court excluded the period from June 15 through July 6, which extended from the filing of petitioner's second notice of appeal through the district court's determination that the appeal was frivolous (*ibid.*).

The court also held that the period between July 6, 1984, when petitioner sought a stay from the court of appeals prior to seeking a writ of mandamus, and April 19, 1985, when the mandate issued on the court of appeals' denial of the petition, was excludable "as an interlocutory appeal under [18 U.S.C.] § 3161(h)(1)(E)" (Pet. App. 37). The court explained that the petition "was in actuality an interlocutory appeal because [petitioner] was claiming that his attempted appeal from the district court's order raised a non-frivolous double jeopardy claim and was immediately appealable" (*ibid.*) Because only 55 days of nonexcludable time had elapsed between the withdrawal of petitioner's plea and the start of trial (June 5-13, 1984, and April 19-June 4, 1985), the court of appeals held that the requirements of the Act had been satisfied (*id.* at 38).

3. Petitioner's principal contention—that the time consumed in disposing of his petition for mandamus is not excludable from the 70-day Speedy Trial Act indictment-to-trial limit (Pet. 17-20)—is without merit. That 70-day period is not counted in consecutive calendar days. Instead, the Act by its terms excludes from the 70-day computation "(1) [a]ny period of delay resulting from other proceedings

concerning the defendant, including but not limited to— * * * (E) delay resulting from any interlocutory appeal." 18 U.S.C. 3161(h). As the court of appeals explained, petitioner's request for mandamus "was in actuality an interlocutory appeal" because it contended that the denial of his motion to dismiss was immediately appealable under *Abney* v. *United States*, 431 U.S. 651 (1977) (Pet. App. 37). That request therefore created delay that is excludable under Section 3161(h)(1)(E).

Moreover, even if petitioner is correct in his contention that the time taken to dispose of a petition for mandamus does not fall within the literal language of Section 3161(h)(1)(E), that period plainly is a "period of delay resulting from other proceedings concerning the defendant." The period therefore is excludable under the catch-all introductory language of Section 3161(h)(1). That general exclusion is, by its terms, "not limited to" delay resulting from the particular types of proceedings (such as interlocutory appeals) listed in Subections (A)-(J). See S. Rep. 96-212, 96th Cong., 1st Sess. 10 (1979). The Judicial Conference, in its authoritative interpretation of the Act, has thus concluded that, "[a]lthough an application for an extraordinary writ is not, strictly speaking, an 'interlocutory appeal,' it is an analogous 'other proceeding' excludable under paragraph [3161](h)(1)." Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 34 (rev. Dec. 1979, with amendments through Oct. 1984).[1]

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[1]The purpose of the Act plainly would be frustrated were this not the case. By obtaining a stay of the trial from the court of appeals, petitioner made it impossible for the district court to try the case expeditiously. Having done that, petitioner should be foreclosed from winning dismissal of his indictment by claiming that he was not tried in a timely fashion. Cf. *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 14; *United States* v. *Studnicka*, 777 F.2d 652, 658 (11th Cir. 1985).

Petitioner's remaining contention (Pet. 12-16) is that the periods of June 13-14, 1984, and June 15-July 6, 1984, are not excludable. Petitioner acknowledges that periods of delay resulting from the filing of a pretrial motion and from the court's consideration of any "proceeding concerning the defendant" (up to a maximum of 30 days) are excludable under 18 U.S.C. 3161(h)(1)(F) and 3161(h)(1)(J), respectively. He insists, however, that his notices of appeal and motions to stay proceedings were "lodged" rather than "filed" and therefore did not trigger Section 3161(h)(1)(F); he also asserts that the district court did not actually have the notices or motions under advisement, so that the Section 3161(h)(1)(J) exclusion is inapplicable.

These contentions are frivolous. The suggestion that the district court never took the motions under advisement is belied by the manner in which it disposed of them: the court resolved both motions in timely written orders that addressed the substance of petitioner's requests. See Pet. App. 6-7, 8-10. Indeed, the court was obligated to give meaningful consideration to the motions for a stay and accompanying notices of appeal because the appeals, unless frivolous, would have ousted the court of jurisdiction to proceed with the case. When a pretrial notice of appeal is filed that asserts a double jeopardy claim, the district judge cannot continue with pretrial proceedings or commence the trial until he determines that the appeal is frivolous; the court is essentially divested of jurisdiction over the case during that period.[2] The district court thus was obligated to

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[2]See, *e.g.*, *United States* v. *Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983), cert. denied, 464 U.S. 1045 (1984); *United States* v. *Hines*, 689 F.2d 934, 936-938 (10th Cir. 1982); *United States* v. *Hastings*, 681 F.2d 706, 709 n.4 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); *United States* v. *Grabinski*, 674 F.2d 677, 679-680 (8th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982); *United States* v. *McQuilkin*, 673 F.2d 681, 687 (3d Cir. 1982); *United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.),

consider the import of the notices of appeal and to find the appeals frivolous—a finding that the court made explicitly on July 6, 1984 (Pet. App. 10)—before proceeding with the case.[3] The entire period of June 13-July 6, 1984, therefore is excludable under Section 3161(h)(1)(J) as delay "attributable to any period * * * during which any proceeding concerning the defendant is actually under advisement," as well as under Section 3161(h)(1)(E) as delay resulting from an interlocutory appeal.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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cert. denied, 457 U.S. 1134 (1982); *United States* v. *Dunbar*, 611 F.2d 985, 986, 988-989 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980). Cf. *United States* v. *Claiborne*, 727 F.2d 842, 850-851 (9th Cir.), cert. denied, 469 U.S. 829 (1984).

[3]Petitioner maintains (Pet. 14-16) that his second notice of appeal was "lodged" rather than "filed." This distinction is without substance. In referring to the notice as being "lodged," the district court plainly meant to indicate only that, in its view, petitioner's motion to dismiss the indictment was not appealable (see Pet. App. 10). The court of appeals thus treated the notice of appeal as having been filed (*id.* at 32-33, 36).

[4]This conclusion is unaffected by some confusion in the court of appeals' opinion about the filing date of petitioner's second motion to stay proceedings. The court of appeals assumed that the motion was filed on June 15, along with petitioner's second notice of appeal (see Pet. App. 36); it appears, instead, to have been filed on June 29, 1984 (see *id.* at 12-13). The discrepancy is immaterial, however, because the filing of the notice of appeal itself excluded the period following June 15.

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